UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

WENDY KROSSCHELL, on behalf of herself and all others similarly situated, Plaintiff, v. MENU FOODS INCOME FUND, MENU FOODS, INC., MENU FOODS HOLDINGS, INC., MENU FOODS MIDWEST CORPORATION, CHEMNUTRA INC., and CHEMNUTRA LLC, Defendants.	Case No.: ____________ **CLASS ACTION COMPLAINT** **JURY TRIAL DEMANDED**

Plaintiff Wendy Krosschell ("Plaintiff"), individually and on behalf of all others similarly situated, alleges by and through her attorneys, upon information and belief, as follows:

NATURE OF THE ACTION

1. Plaintiff brings this class action on behalf of herself and a class of Minnesota persons and entities who purchased dog and cat food and treats manufactured by Menu Foods Income Fund; Menu Foods Holdings, Inc; Menu Foods, Inc; and Menu Foods Midwest Corporation, and supplied by ChemNutra, Inc. and ChemNutra, LLC ("Defendants' Pet Food Products") that were the subject of a recall by Defendants in 2007. Pet owners, believing Defendants' Pet Food Products to be safe for pet consumption, incurred substantial expenses relating to the purchase of the pet food and to

Dockets.Justia.com

the veterinary monitoring and treatment that became necessary after their pets consumed Defendants' Pet Food Products. Such expenses were even more extreme for those pet owners whose pets became terminally ill after consuming Defendants' Pet Food Products. Such costs arose and were exacerbated by the undue amount of time taken by Defendants to announce the dangers associated with their Pet Food Products. Although Defendants knew that pet illnesses and deaths could be related to their pet foods, Defendants waited for nearly a month before telling the public and the Food and Drug Administration (FDA) that it was recalling its Pet Food Products. Defendants' lethal products, and the companies' excessive delay in warning consumers and regulatory agencies as to its dangers, resulted in significant financial loss to thousands of pet owners.

JURISDICTION AND VENUE

2. The Court has original jurisdiction over this class action pursuant to 28 U.S.C. §1332(d)(2).

3. Venue in this judicial district is proper pursuant to 28 U.S.C. § 1391(a)(1) because Plaintiff resides in this judicial district. Venue is also proper pursuant to 28 U.S.C. § 1391(a)(2) because a substantial part of the events or omissions giving rise to the claim occurred in this judicial district.

4. The members of the putative Class have suffered aggregate damages exceeding $5,000,000, exclusive of interest and costs.

PARTIES

5. Plaintiff Wendy Krosschell is a resident of Murray County, Minnesota.

6. Defendant Menu Foods Income Fund is a Canadian company with its

principal executive offices located at 8 Falconer Drive, Streetsville, Ontario, Canada L5N 1B1.

7. Defendant Menu Foods Holdings, Inc. is a Delaware corporation and may be served through its registered agent for service, The Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware.

8. Defendant Menu Foods, Inc. is a New Jersey corporation with its principal executive offices located at 9130 Griffith Morgan Lane, Pennsauken, New Jersey 08110.

9. Defendant Menu Foods Midwest Corporation is a Delaware corporation with its principal executive offices located at P.O. Box 1046, 1400 East Logan Avenue, Emporia, Kansas 66801. Menu Foods Midwest Corporation is a wholly-owned subsidiary of Menu Foods, Inc.

10. Unless otherwise stated, Defendants Menu Foods Income Fund; Menu Foods Holdings, Inc; Menu Foods, Inc; and Menu Foods Midwest Corporation are collectively referenced as "Menu Foods."

11. Defendant ChemNutra Inc. is a Delaware corporation that maintains its principal place of business in Las Vegas, Nevada.

12. Defendant ChemNutra LLC is a Chinese company with its principal executive offices located at Hangzhou, hz, Zhejiang, China 310030.

13. At all times herein mentioned, Defendants were the agents, principals, employees, servants, partners, joint venturers, and representatives of each other. In doing the acts hereinafter alleged, they each were acting within the scope and course of their authority as such agents, principals, employees, servants, partners, joint venturers, and

representatives, and were acting with the permission and consent of the other Defendant.

FACTUAL ALLEGATIONS

14. Menu Foods manufactures and sells pet food internationally and are the biggest supplier of pet food in North America.

15. Menu Foods sells pet food under nearly 100 different brand names, some of which are the most popular brands of dog and cat food in the industry – e.g., Iams, Eukanuba, Science Diet, among others.

16. Menu Foods sells their brands internationally and in some of the largest major retail chains in the United States, such as Wal-Mart, Safeway, Kroger, PetSmart and Meijer.

17. ChemNutra imports wheat gluten from China and supplies it to Menu Foods for use in Defendants' Pet Food Products.

18. On March 16, 2007, Menu Foods, in conjunction with the Food and Drug Administration (FDA), announced a massive immediate recall of approximately 60 million containers of "cuts and gravy" pet food (pet food consisting of pieces of meat in gravy) throughout the United States based on widespread reports of pet illness and death, mostly related to kidney failure. The recall covers all "cuts and gravy" wet pet food produced and distributed by Menu Foods, including over ninety different brands of dog and cat food. Some of the brands recalled include, Iams, Eukanuba, Best Choice, Paws, and Nutro Max. Menu Foods' recall is the largest pet food recall in United States history.

19. However, Menu Foods waited an excessive period of time before deciding to recall its harmful and lethal products. Menu Foods first started receiving complaints of

pet illnesses and deaths as early as late-February, almost a full month before deciding to recall its products. *See*, *e.g.*, CBSNews.com, *Pet Food Co. Knew of Problem Last Month*, March 20, 2007, *at* http://www.cbsnews.com/stories/2007/03/20/national/main2587087.shtml (last viewed March 29, 2007). Rather than announcing its Pet Food Products could be harmful to pets as soon as it learned of pet illnesses and deaths, Menu Foods decided to conduct its own testing starting on February 27, 2007. Menu Foods conducted tests involving over 50 animals to observe reactions to its pet foods. Approximately one in six of the animals tested died in early March 2007. Yet, Menu Foods again waited until as many as seven test subjects died after eating its Pet Food Products before finally submitting its findings to the FDA and deciding that a recall and announcement to the public would be necessary.

20. Due in no small part to this unnecessary and protracted delay, as of April 3, 2007 there have been at least 3,057 reported pet deaths from kidney failure nationwide, among which 1,657 are cats, and 1,400 are dogs, and additional deaths continue to be reported by the hour. One source indicated that 8,800 dogs and cats were either sick or dead as a result of the recalled food products. *See* http://www.petconnection.com/blog/ (last viewed April 3, 2007).

21. Pet owners purchased Defendants' Pet Food Products believing them to be safe for pet consumption and beneficial to their pets. However, the "cuts and gravy" style pet food that pet owners across the nation have fed their pets has proved to be toxic, causing renal failure in cats and dogs as well as physical disorders such as dehydration,

diarrhea, loss of appetite, increased thirst, lethargy, and vomiting.

22. Pet owners have incurred substantial expenses relating both to the purchase of Defendants' Pet Food Products and from the medical costs associated with monitoring and treating pets who have consumed, or were thought to have consumed, Defendants' contaminated Pet Food Products. Indeed, several pet owners have accrued veterinary bills that have climbed into the several thousands of dollars. Furthermore, for those pet owners whose pets became terminally ill, they were forced to incur additional costs relating to their pets' deaths, such as euthanizing and, for some, burying or cremating their pet.

23. The Food and Drug Administration has found melamine, a substance used to produce plastic kitchenware, glues, countertops, fabrics, fertilizers and flame retardants, in samples of the Defendants' Pet Food Products. Testing by the FDA and Cornell University has found melamine in crystal form in the urine and kidney tissue of dead cats. *See* http://seattlepi.nwsource.com/business/1310AP_Pet_Food_Recall.html?source=mypi (last viewed April 3, 2007).

24. The FDA also recently conducted a search of ChemNutra's Las Vegas offices in connection with ChemNutra's role in supplying Menu Foods with melamine adulterated wheat gluten. *Associated Press*, April 27, 2007.

25. In addition, pet owners who have become increasingly concerned about their pet's health after learning of the recall have received little to no relief from Menu Foods. Menu Foods have failed to manage the high volume of incoming complaints.

Since instituting the recall, pet owners have been largely unable to reach Menu Foods' customer service representatives, often encountering busy signals or voicemail messages. *See*, *e.g.*, Thejournalnews.com, *Pet Owners Growling over Food Recall*, March 20, 2007, *at* http://www.thejournalnews.com/apps/pbcs.dll/article?AID=/20070320/BUSINESS01/703200345/1066 (last viewed March 29, 2007). To be sure, Menu Foods has been criticized for not being cooperative with customers, for not getting helpful information out to the public sooner and for failing to "get control of the crisis . . . employ[ing] a bunker mentality in times of trouble." Joseph R. Perone, The Star-Ledger, *Menu Foods Fails Test in Crisis Management*, March 21, 2007, *available at* http://www.nj.com/starledger/stories/index.ssf?/base/business-6/117445554784980.xml&coll=1 (last viewed March 29, 2007).

26. Since the recall, Menu Foods has received scores of complaints and questions from consumers who have purchased its contaminated Pet Food Products and from those whose pets have become ill or died after consuming those products.

27. The complaints found throughout the Internet and in many of the news stories mentioned above each contain the same common theme of consumers who unwittingly purchased Defendants' Pet Food Products and who were forced to take their pets to veterinarians for medical treatment after their pets became extremely, and sometimes terminally ill.

28. Plaintiff Wendy Krosschell owned a 5 year old cat named Sheba. Sheba was born on or around 2002. In addition to caring for her and feeding her over the years,

Ms. Krosschell incurred veterinarian charges to vaccinate, spay and declaw Sheba.

29. In early March 2007, Ms. Krosschell purchased *Special Kitty* brand Duck and Wild Rice wet pet food from Wal-Mart Stores, Inc. before the recall was announced.

30. Ms. Krosschell started feeding her cat *Special Kitty* pet food on or about March 10, 2007.

31. After feeding about two and half pouches of *Special Kitty* pet food, Ms. Krosschell noticed a decline in her cat's health and took her to a veterinarian on March 16. The veterinarian told her that Sheba was undergoing kidney failure.

32. On March 19, 2007, the veterinarian determined that the cat's condition had significantly worsened and Ms. Krosschell, in order to spare her pet from suffering any further, made the difficult decision to have Sheba euthanized that same day.

33. Plaintiff then called Menu Foods and spoke with a customer service representative. She was told the Company would call her. To this date, she still has not heard back from the Company.

34. In addition to Plaintiff suffering emotional distress from the loss of her cat, she spent approximately $200 on veterinary bills as a result of the cat's illness caused by the contaminated food, which was not covered by insurance. In addition to these costs, Plaintiff has not received any refunds for the cost of the contaminated cat food that initially purchased. Finally, she will incur costs to obtain a new cat, have it vaccinated, spayed, and declawed.

CLASS ACTION ALLEGATIONS

35. Plaintiff brings this action as a class action pursuant to Federal Rule of

Civil Procedure 23(a) and 23(b) on behalf of herself and all others similarly situated as members of the following class (the "Class"): All persons and entities in Minnesota that purchased recalled dog or cat food exported, imported, manufactured, distributed, marketed and/or sold by Defendants.

36. Subject to additional information obtained through further investigation and discovery, the Class definition may be expanded or narrowed by amendment or amended complaint. Specifically excluded are Defendants, their officers, directors, agents, trustees, parents, children, corporations, trusts, representatives, employees, principals, servants, partners, joint venturers, or entities controlled by Defendants, and their heirs, successors, assigns, or other persons or entities related to or affiliated with Defendants and/or their officers and/or directors, or any of them; the Judge assigned to this action, and any member of the Judge's immediate family; and government entities.

37. **Numerosity**. The members of the Class are so numerous that their individual joinder is impracticable. Plaintiff is informed and believes, and on that basis alleges, that the proposed class contains thousands of members. The precise number of Class members is unknown to Plaintiff. The true number of Class members are known by Defendants, however, and thus, may be notified of the pendency of this action by first class mail, electronic mail, and by published notice.

38. **Existence and Predominance of Common Questions of Law and Fact**. Common questions of law and fact exist as to all members of the Class and predominate over any questions affecting only individual Class members. These common legal and factual questions include, but are not limited to, the following:

a. Whether Defendants intentionally, recklessly or negligently authorized injurious pet food to enter the market;

b. Whether Defendants failed to properly test their wheat gluten ingredients and/ or Pet Food Products before supply, export, and/ or market entry of such food;

c. Whether Defendants intentionally, recklessly or negligently delayed in instituting a recall of its Pet Food Products;

d. Whether Menu Foods' recall is adequate and properly notifies potentially affected consumers;

e. Whether Defendants' conduct constituted unlawful, unfair, or fraudulent business practices in violation of Minn. Stat. 325D.13 et seq. (deceptive trade practices) and Minn. Stat. 325D.44 et seq. (unlawful trade practices), as alleged herein;

f. Whether Defendants have been unjustly enriched as a result of their conduct, as alleged herein; and

g. Whether Plaintiff and members of the Class have sustained damages as a result of Defendants' conduct, and, if so, what is the appropriate measure of damages.

39. **Typicality**. Plaintiff's claims are typical of the claims of the members of the Class in that Plaintiff and each member of the Class purchased Defendants' Pet Food Products.

40. **Adequacy of Representation**. Plaintiff will fairly and adequately protect

the interests of the members of the Class. Plaintiff has retained counsel experienced in complex consumer class action litigation, and Plaintiff intends to prosecute this action vigorously. Plaintiff has no adverse or antagonistic interests to those of the Class.

41. **Superiority**. A class action is superior to all other available means for the fair and efficient adjudication of this controversy. The damages or other financial detriment suffered by individual Class members is relatively small compared to the burden and expense that would be entailed by individual litigation of their claims against the Defendants. It would thus be virtually impossible for Class members, on an individual basis, to obtain effective redress for the wrongs done to them. Furthermore, even if Class members could afford such individualized litigation, the court system could not. Individualized litigation would create the danger of inconsistent or contradictory judgments arising from the same set of facts. Individualized litigation would also increase the delay and expense to all parties and the court system from the issues raised by this action. By contrast, the class action device provides the benefits of adjudication of these issues in a single proceeding, economies of scale, and comprehensive supervision by a single court, and presents no unusual management difficulties under the circumstances here.

42. In the alternative, the Class may be certified because:

a. the prosecution of separate actions by individual Class members would create a risk of inconsistent or varying adjudication with respect to individual Class members that would establish incompatible standards of conduct for the Defendants;

b. the prosecution of separate actions by individual Class members would create a risk of adjudications with respect to them that would, as a practical matter, be dispositive of the interests of other Class members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; and/or

c. Defendants have acted or refused to act on grounds generally applicable to the Class thereby making appropriate final and injunctive relief with respect to the members of the Class as a whole.

43. Adequate notice can be given to Class members directly using information maintained in Defendants' records, or through publication notice.

44. Defendants benefited from the sale of its Pet Food Products to Plaintiff and the Class. The benefit to Defendants can be identified from the sale of such Pet Food Products to Plaintiff and the Class and that such monies can be restored to Plaintiff and the Class. Such monies are the property of the Plaintiff and the Class. All or a portion of this benefit retained by Defendants is money in which Plaintiff and the Class have an ownership interest. Plaintiff and the Class were injured and lost money as a result of Defendants' unfair, unlawful and fraudulent business practices described herein.

FIRST CAUSE OF ACTION
(Consumer Fraud Act)

45. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

46. Minnesota's Consumer Fraud Act prohibits the "act, use or employment by any person of any fraud, false pretense, misrepresentation misleading statement or deceptive practice, with the intent that others rely thereon in connection with the sale of any merchandise, whether or not any person has in fact been mislead, deceive, or damaged thereby." Minn. Stat. §325F.69, subd. 1.

47. Defendants' conduct described herein constitutes the employment of fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice upon Plaintiff and the Class members within the meaning of Minn. Stat. §325F.69.

48. If Defendants speak, they must say enough to prevent their words from misleading Plaintiff and the Class members. Likewise, Defendants had special knowledge of material facts to which Plaintiff and the Class members did not have access, and therefore, had a duty to disclose these facts to the other party so as to prevent its statements from being misleading.

49. Defendants' failure to tell purchasers that their Pet Food Products presents an unreasonable and unacceptable risk of injury or death to pets, and would result in foreseeable and avoidable damage, constitutes a violation of the Consumer Fraud Act.

50. Defendants engaged in these false and misleading statements and deceptive practices with the intent that they result, and which did result, in the sale of their Pet Food Products to Plaintiff and the Class.

51. Pursuant to Minn. Stat. §325F.70, Plaintiff and the Class are entitled to an injunction preventing Defendants from continuing to engage in unlawful, unfair or

fraudulent business practices, and any other act prohibited by law, along with her costs, including costs of investigation and reasonable attorneys' fees.

52. Plaintiff and the Class suffered damages as a result of Defendants' conduct and are entitled to recover those damages, along with costs or investigation and attorneys' fees and costs, pursuant to Minn. Stat. §8.31, subd.3(a).

SECOND CAUSE OF ACTION
(Deceptive Trade Practices)

53. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

54. Minn. Stat. §325D.44, subd. 1 provides in part:

> A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person:
>
> (5) Represents that goods or services have…characteristics, ingredients, uses, benefits…that they do not have.
>
> (7) Represents that goods or services are of a particular standard, quality, or grade,…if they are of another.

55. Defendants misrepresented the characteristics of the Pet Food Products, and misrepresented that they are suitable for pet consumption.

56. Defendants' failure to notify purchasers of material facts about the characteristics of their Pet Food Products constitutes a violation of the Deceptive Trade Practices Act.

57. Defendants made these representations to Plaintiff and the Class members with the intent they rely thereon in purchasing the Pet Food Products.

58. Defendants' false and misleading statements and deceptive practices caused Plaintiff and the Class members to be harmed.

59. Pursuant to Minn. Stat. §325D.45, subd. 1 & 2, Plaintiff and the Class are entitled to an injunction preventing Defendants from continuing to engage in unlawful, unfair or fraudulent business practices, and any other act prohibited by law, along with her costs, including costs of investigation and reasonable attorneys' fees.

60. Plaintiff and the Class suffered damages as a result of Defendants' conduct and are entitled to recover those damages, along with costs or investigation and attorneys' fees and costs, pursuant to Minn. Stat. §8.31, subd.3(a).

THIRD CAUSE OF ACTION
(False Advertising)

61. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

62. Minn. Stat. §325F.67 provides in part:

> Any person, firm, corporation, or association who…makes, publishes, disseminates circulates, or places before the public…an advertisement of any sort regarding merchandise…which advertising contains any material assertion, representation or statement of fact which is untrue, deceptive, or misleading, shall, whether or not pecuniary or other specific damage to any person occurs as a direct result thereof…be guilty [of an unlawful practice].

63. Defendants' conduct described herein constitutes false advertising with the intent that Plaintiff and the Class members rely thereon in purchasing their Pet Food Products.

64. If Defendants speak, they must say enough to prevent their words from misleading Plaintiff and the Class members. Likewise, Defendants had special knowledge of material facts to which Plaintiff and the Class members did not have access, and therefore, had a duty to disclose these facts to the other party so as to prevent their statements from being misleading.

65. Defendants' failure to tell Class members that their Pet Food Products presents an unreasonable and unacceptable risk of injury or death to pets, and would result in foreseeable and avoidable damage, constitutes a violation of the False Advertising Act.

66. Defendants' false and misleading statements and deceptive practices caused Plaintiff and the Class members to be harmed.

67. Pursuant to Minn. Stat. §325F.70, Plaintiff and the Class are entitled to an injunction preventing Defendants from continuing to engage in unlawful, unfair or fraudulent business practices, and any other act prohibited by law, along with her costs, including costs of investigation and reasonable attorneys' fees.

68. Plaintiff and the Class suffered damages as a result of Defendants' conduct and are entitled to recover those damages, along with costs or investigation and attorneys' fees and costs, pursuant to Minn. Stat. §8.31, subd.3(a).

FOURTH CAUSE OF ACTION
(Unlawful Trade Practices)

69. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein. Plaintiff asserts this claim against each and every

Defendant on behalf of herself and the Class.

70. Pursuant to Minn. Stat. §325D.13, no person shall, in connection with the sale of merchandise knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise.

71. Defendants' conduct described herein constitutes a misrepresentation of the true qualities of Defendants' Pet Food Products, with the intent that Plaintiff and the class members rely thereon in purchasing their Pet Food Products.

72. Defendants' failure to tell purchasers that their Pet Food Products presents an unreasonable and unacceptable risk of injury or death to pets, and would result in foreseeable and avoidable damage, constitutes a violation of the Unlawful Trade Practices Act.

73. Defendants' false and misleading statements and deceptive practices caused Plaintiff and the Class members to be harmed.

74. Plaintiff and the Class suffered damages as a result of Defendants' conduct and are entitled to recover those damages, along with costs or investigation and attorneys' fees and costs, pursuant to Minn. Stat. §8.31, subd.3(a).

75. Pursuant to Minn. Stat. §325D.15, Plaintiff and the Class are entitled to an injunction preventing future violations of law by Defendants, along with their costs, including costs of investigation and reasonable attorneys' fees.

FIFTH CAUSE OF ACTION
(Negligence)

76. Plaintiff hereby incorporates by reference each of the preceding allegations as though fully set forth herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

77. Defendants owed a duty to Plaintiff and the Class to provide pet food safe and suitable for pet consumption.

78. Through their failure to exercise due care, Defendants were negligent in supplying, exporting, importing, manufacturing, distributing, marketing and/ or selling their Pet Food Products to Plaintiff and the Class.

79. Defendants failed to implement adequate quality control and adequate testing of its Pet Food Products that they introduced into the stream of commerce for sale to Plaintiff and the Class and for consumption by their pets.

80. Defendants knew, or should have known, that their Pet Food Products, as described above, presents an unreasonable and unacceptable risk of injury or death to pets, and would result in foreseeable and avoidable damage.

81. The losses and damages described herein were foreseeable and avoidable.

82. Defendants' negligence proximately caused the losses and damages to Plaintiff and the Class.

SIXTH CLAIM FOR RELIEF
(Unjust Enrichment)

83. Plaintiff hereby incorporates by reference all paragraphs previously alleged herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself

and the Class.

84. Defendants have received, and continue to receive, a benefit at the expense of Plaintiff and members of the Class. Defendants have knowledge of this benefit.

85. Defendants have charged and collected from consumers, including Plaintiff and members of the Class, money for the Pet Food Products that endangers the lives of their pets. Defendants thus have received benefits that they have unjustly retained at the expense of Plaintiff and members of the Class.

86. As a direct and proximate result of Defendants' unlawful acts and conduct, Plaintiff and members of the Class were deprived of the use of their monies that was unlawfully charged and collected by Defendants, and are therefore entitled to restoration of their monies.

SEVENTH CLAIM FOR RELIEF
(Breach of Express Warranty)

87. Plaintiff hereby incorporates by reference all paragraphs previously alleged herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

88. Defendants expressly warranted that their Pet Food Products were suitable and safe for pet consumption.

89. Menu Foods in particular, expressly warranted that "it manufacture[s] the private-label wet pet-food industry's most comprehensive product program with the highest standards of quality."

90. Plaintiff and the Class were induced by Defendants' supplying, exporting,

importing, marketing, advertising, promotion and/ or labeling of the Pet Food Products as suitable "food" to rely upon such express warranty, and, in fact, relied upon the untrue warranty in purchasing the recalled Pet Food Products and feeding it to their pets.

91. Plaintiff and the Class were damaged as a proximate result of Defendants' breach of their express warranty.

EIGHTH CLAIM FOR RELIEF
(Breach of Implied Warranty)

92. Plaintiff hereby incorporates by reference all paragraphs previously alleged herein. Plaintiff asserts this claim against each and every Defendant on behalf of herself and the Class.

93. Defendants are merchants under section 2-104 and 2-314 of the Uniform Commercial Code.

94. Through their supplying, exporting, importing, marketing, advertising, promotion and/ or labeling of their Pet Food Products, Defendants impliedly warranted that such Pet Food Products was fit for the ordinary purpose for which it was intended, including to safely nourish pets without risk of illness or death, pursuant to section 2-314 of the Uniform Commercial Code.

95. Through their supplying, exporting, marketing, advertising, promotion and/ or labeling, Defendants knew that Plaintiff and the Class would purchase their Pet Food Products for the ordinary purpose of providing nourishment to their pets.

96. Defendants supplied, exported, manufactured, distributed, marketed, advertised, promoted and/ or sold their Pet Food Products for the ordinary purpose for

which it was purchased by Plaintiff and the Class.

97. Plaintiff and the Class relied upon Defendants' representations and warranties, and purchased and used Defendants' Pet Food Products for the ordinary purpose for which it was sold.

98. Defendants' Pet Food Products purchased by Plaintiff and the Class were unfit for their ordinary purpose when sold. Such Pet Food Products were sold while presenting a risk of risk of illness or death to pets. Defendants have accordingly breached the implied warranty of merchantability by selling such unfit pet food.

99. Plaintiff and the Class were damaged as a proximate result of Defendants' breach of warranty.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of herself and all others similarly situated, prays for judgment against Defendants as follows:

1. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and appointing Plaintiff and her counsel of record to represent the Class;
2. For restitution, disgorgement and/or other equitable relief as the Court deems proper;
3. That pursuant to Minn. Stat. §325F.70 and Minn. Stat. §325D.15, Defendants be permanently enjoined from performing or proposing to perform any of the aforementioned acts of unfair, unlawful and fraudulent business practices;

4. For compensatory damages sustained by Plaintiff and all others similarly situated as a result of Defendants' unlawful acts and conduct;

5. For a permanent injunction prohibiting Defendants from engaging in the conduct and practices complained of herein;

6. For pre-judgment and post-judgment interest;

7. For reasonable attorneys' fees and costs of suit, including expert witness fees; and

8. For such other and further relief as this Court may deem just and proper.

JURY DEMAND

To the full extent available, Plaintiff demands a trial by jury.

Dated: April 27, 2007

s/Daniel C. Hedlund
Daniel E. Gustafson (#202241)
Daniel C. Hedlund (#0258337)
Gustafson Gluek PLLC
650 Northstar East
608 Second Avenue South
Minneapolis, MN 55402
Telephone: (612) 333-8844
Facsimile: (612) 339-6622

Dennis Stewart
Hulett Harper Stewart LLP
550 West "C" Street, Suite 1600
San Diego, CA 92101
Telephone: (619) 338-1133
Facsimile: (619) 338-1139

Dianne M. Nast
RodaNast, P.C.
801 Estelle Drive
Lancaster, PA 17601
Telephone: (717) 892-3000
Facsimile: (717) 892-1200

Joseph Goldberg
Freedman Boyd Daniels Hollander & Goldberg P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
Telephone: (505) 842-9960
Facsimile (505) 842-0761

Attorneys for Plaintiff and the Class